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Supreme Court, U.S.
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No. 97-1472

In The

Supreme Court of the United States

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, Individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Does loss of "at will" employment give rise to compensable damage under 42 U.S.C. § 1985(2)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption hereof.

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Neither the Orders entered by the United States District Court on June 25, 1996 (J.A. 39-42) and August 13, 1996 (J.A. 45-46), dismissing the Complaint as to all Defendants (Respondents herein), nor the Per Curiam Order of the United States Court of Appeals for the Eleventh Circuit issued December 5, 1997 (J.A. 49-50), affirming the dismissals, has been reported.

STATUTE INVOLVED

42 U.S.C. 1985

Conspiracy to Interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State of Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons

within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This case was dismissed on a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The following Statement is therefore made on the basis of the allegations contained in the Amended Complaint (J.A. 17-28), which must be taken as true for this purpose.

For almost ten years preceding April 13, 1995, Petitioner Michael A. Haddle ("Haddle") was employed by Respondent Healthmaster, Inc. ("Healthmaster"), a corporation controlled by Respondent Jeannette G. Garrison ("Garrison"). J.A. 19 (paras. 7 & 9). On March 8, 1995, a

federal grand jury indicted Healthmaster, Garrison, Respondent Dennis Kelly ("Kelly") (who along with Garrison was a corporate officer and director of Healthmaster) and others on numerous Medicare fraud and other criminal charges. J.A. 19-20 (para. 12). Beginning on April 13, 1995, Haddle's employment was transferred to Healthmaster Home Health Care, Inc., a wholly owned subsidiary of Healthmaster. J.A. 19 (para. 8). In April or May, 1995, a Trustee was appointed for Healthmaster Home Health Care, Inc. by the United States Bankruptcy Court for the Southern District of Georgia, pursuant to Chapter 11 of the Bankruptcy Code, and Garrison and Kelly were banned from any participation in the affairs of Healthmaster Home Health Care, Inc., again by order of the Bankruptcy Court. J.A. 19-20 (paras. 9 & 15).

Haddle cooperated with the investigation by federal agents which led to the indictment of several Respondents and appeared pursuant to subpoena to testify before the grand jury, although his testimony was not actually taken due to the press of time. J.A. 20 (para. 14). On June 21, 1995, after Respondents became aware that Haddle would appear as a witness at the criminal trial on the indictments, Respondent J. Peter Molloy ("Molloy"), an officer and director of Healthmaster and president of Healthmaster Home Health Care, Inc., who had been retained in the latter position by the Trustee, fired Haddle. Molloy acted at the direction of Garrison and Kelly and pursuant to a prior understanding between these persons. Amended Complaint, para 16, J.A. 20 (para. 16). This was done pursuant to an agreement between Respondents to retaliate against Haddle for his cooperation with federal agents and his appearance to

testify before the federal grand jury, and in order to intimidate him and others from cooperating with federal agents or testifying in any criminal matters against Respondents, including the indictments. J.A. 21 (paras. 18 & 19).

Furthermore, Respondents also similarly caused another person (John B. O'Neal) to be terminated from his employment in retaliation for his testimony before the same federal grand jury. J.A. 23 (para. 26).

Since this case was dismissed on a motion under Rule 12(b)(6), there is little in the way of an evidentiary Record. However, in determining whether Haddle can prove any set of facts in support of his claim, it is permissible for this Court to take judicial notice of matters in the public record which support the allegations of his complaint. See, *e.g, MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (CA 9 1986), and *Hanson v. C.S.C. Credit Service*, 29 F.3d 280, 283 (CA 7 1994). Haddle's allegations were strikingly supported by an affidavit which is in the Record in this case, having been submitted before the ruling of the District Court on motion to dismiss. This affidavit was given by Robert Pittard, Human Resources Director (employment manager) for Healthmaster and subsequently for Healthmaster Home Health Care, Inc. Mr. Pittard swore that Garrison and Molloy had a conversation in his presence about how to fire Haddle in retaliation for his assistance to the Government, while making it appear that this was not the reason, and subsequently told Pittard on "a couple of occasions" that this was their desire. Pittard also swore that he met with Molloy shortly before Molloy terminated Haddle's employment, and that when he questioned the decision to terminate Haddle,

Molloy told him that protest was useless because Molloy had been instructed by "the Board" and "the attorney" to terminate Haddle. Record Docket No. 51, Exhibit 1. It is undisputed that Healthmaster Home Health Care, Inc. was under the control of the Trustee appointed by the Bankruptcy Court. No "Board" had any authority to instruct Molloy to terminate Haddle.

O'Neal, the other person named in Haddle's complaint as having been retaliated against for cooperating in the same criminal investigation and testifying before the same grand jury, has obtained a federal jury verdict and judgment for nearly $500,000, based on the anti-retaliation provisions of the False Claims Act, 31 U.S.C. Section 3730(h), against a corporation controlled by Garrison. *O'Neal v. Master Health Plan, Inc.*, Case No. CV 196-28 in the United States District Court for the Southern District of Georgia. Testimony concerning Haddle's discharge was allowed in the *O'Neal* case under Rule 404(b), Federal Rules of Evidence, upon the finding of the District Judge that the circumstances of Haddle's dismissal were sufficiently similar to those of O'Neal to meet the requirements of the rule. This judgment is now on appeal in the United States Court of Appeals for the Eleventh Circuit.

Haddle brought his own action under 42 U.S.C. 1985(2) against Garrison, Healthmaster, Molloy, and Respondent Dennis Kelly ("Kelly") (an associate of Garrison's and an officer of Healthmaster, who is also serving a federal prison sentence upon his conviction for Medicare fraud arising out of the same investigation), alleging that these defendants conspired to bring about Haddle's discharge by deceiving the Trustee, in order to effectuate retaliation against Haddle.

Haddle admitted that he was an "at will" employee under state law and that his only damages were those resulting from the loss of his job. The District Court dismissed the case on the authority of *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), which holds that loss of "at will" employment cannot be cognizable damages under 42 U.S.C. § 1985(2). J.A. 39-42, 45-46. The District Court did not reach any other issue or defense.

On appeal, the United States Court of Appeals for the Eleventh Circuit, having declined Haddle's suggestion for hearing *en banc*, affirmed the District Court's action in an unpublished opinion. J.A. 49-50.

After the dismissal of his federal case, and during this appeal, in which he argues that he has a right of action under 42 U.S.C. § 1985(2), Haddle refiled his pendent state claims (for tortious interference with contract under state law and for violation of Georgia's "RICO" statute) in a Georgia state court. The Georgia state court granted summary judgment to Respondents on these state law claims (J.A. 53-64), which was affirmed by the Georgia Court of Appeals. See Appendices B, D and F to Respondents' Motion in this Court to Dismiss Writ of Certiorari as Improvidently Granted. The state court, however, did not address whether Haddle had presented evidence sufficient to show a conspiracy, either under 42 U.S.C. § 1985 or under state law. J.A. 56-57. The state court judgment, which is based solely on its finding that Molloy had authority to discharge Haddle as an at will employee, did not by necessary implication (as Respondents incorrectly assert) find that Respondents did not conspire, intimidate or retaliate against Haddle. See

Haddle's Response in this Court to Respondents' Motion to Dismiss the Writ.

SUMMARY OF THE ARGUMENT

A. Haddle has sufficiently alleged an injury to person or property within the meaning of 42 U.S.C. § 1985. The phrase "injured in his person or property" must be construed broadly, in light of the plain words of the statute, the Congressional purpose and contemporary usage. The idea that an injury must be to a "constitutionally protected" interest is not applicable to the first clause of § 1985(2), which concerns exclusively matters of direct concern to the institutional interest of the federal government in the operation of its own court system. *Kush v. Rutledge*, 460 U.S. 719 (1972).

B. The first clause of § 1985(2) protects and is intended to protect all federal witnesses who lose their jobs as a result of attending and giving truthful testimony in federal court, not just those who have contractual security of employment. In this highly remedial statute, it would be irrational to draw a distinction between witnesses having contractual security of employment and those whose employment is more precarious, *in favor of the less vulnerable class.*

C. Even if resort to state law is required to determine whether Haddle has alleged injury to person or property within the meaning of 42 U.S.C. § 1985, nevertheless Haddle has stated a claim under the statute. Under Georgia state law and general common law principles, the economic damage flowing from loss of at will

employment is an injury to a "property right". *Troy v. Interfinancial, Inc.*, 171 Ga.App. 763, 320 S.E.2d 872 (1984) *cert. denied*. Who may be held *liable* for such a loss under 42 U.S.C. § 1985, however, is necessarily and by the plain words of the statute a question of federal law. 42 U.S.C. § 1985 provides that the injured party "may have an action for the recovery of damages occasioned by such injury *against any one or more of the conspirators*" (emphasis supplied).

D. The purposes underlying 42 U.S.C. § 1985 strongly support protecting witnesses who lose their at will employment because they have attended federal court proceedings and testified truthfully therein. It makes no sense to restrict this protection to those who have contractual rights to job security and exclude those who are at the mercy of their employers.

ARGUMENT

A. Haddle has sufficiently alleged an injury to person or property within the meaning of 42 U.S.C. 1985. The phrase "injured in his person or property" must be construed broadly, in light of the plain words of the statute, the Congressional purpose underlying the statute, and contemporary usage. The idea that an injury must be to a "constitutionally protected" interest is not applicable to the first clause of § 1985(2), which concerns exclusively matters of direct concern to the institutional interest of the federal government in the operation of its own court system.

42 U.S.C. § 1985(2) provides a civil remedy for the victim of a conspiracy "to deter, by force, intimidation, or

threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . " 42 U.S.C. § 1985(2). The statute goes on to say, in plain and understandable language, that "in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, *whereby another is injured in his person or property . . . the party so injured . . . may have an action for the recovery of damages occasioned by such injury* . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis supplied).

This remedy is made available, according to the express language of the statute, to any person "injured in his person or property". Notwithstanding this broad language, however, the Court of Appeals for the Eleventh Circuit ruled in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) that a federal witness, who is the victim of a successful conspiracy to have him fired from his job in retaliation for his testimony, has no cognizable damages under this statute for being fired, if his job was one which was terminable by his employer "at will". The Court of Appeals followed this precedent in this case, applying it even in this suit which is not against Haddle's employer, but rather against third parties who conspired to cause his employer to fire him. It did so even though Georgia law is clear that an employee has a "property right" in his at will employment (although the employer itself is immune under state law from a suit by the at will

employee). *Troy v. Interfinancial, Inc.*, 171 Ga.App. 763, 766, 320 S.E.2d 872, 877 (Ga. App. 1984), *cert denied*.

The Eleventh Circuit in *Morast* disposed of the at will employee's § 1985(2) claim in three sentences:

> "Finally, to make out a cause of action under § 1985(2), the plaintiff must have suffered an actual injury. Because Morast was an at will employee . . . [citation omitted], he had no *constitutionally protected* interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute."
>
> – 807 F.2d at 930 (emphasis supplied)

It appears that the Eleventh Circuit failed to consider the difference between an action under subsection 3 of § 1985 (or that portion of subsection 2 which addresses state judicial proceedings) and an action under that portion of subsection 2 that addresses the integrity of federal proceedings. This distinction was clearly made by this Court in *Kush v. Rutledge*, 460 U.S. 719 (1983). The issue in interpreting § 1985(2) is not what is a "constitutionally protected" interest, but rather merely what the reach of this federal statute, enacted to protect the integrity and operation of the federal courts, is under its own wording.

The Eleventh Circuit stripped the protection of the statute from those most vulnerable and most in need of it: employees who hold their livelihood "at the will" of their employers, so that those against whom they testify have only to persuade their employers to discharge them from their precarious employment, in order to inflict tremendous injury. There is no justification for this perverse

result, either in the plain language of § 1985(2), in its legislative history, or in public policy.

The allegations of the Amended Complaint herein, as recounted in the Statement of the Case above, show clearly that Haddle has alleged all the elements of a claim under § 1985(2). He alleges that he attended the grand jury proceedings in the criminal case which resulted in the indictments of Respondents other than Molloy, and that this investigation was also directed against Molloy. He alleges further that Respondents learned that he would appear as a witness at the resulting federal trial. He alleges that, in order to intimidate him and others from cooperating with the Government and in retaliation for his attendance at the grand jury and his projected testimony at the trial, Respondents conspired to and in fact did have him fired from his employment at Healthmaster Home Health Care, Inc., a Chapter 11 bankrupt. At the time Haddle was terminated, Garrison, Kelly and Healthmaster ostensibly had no connection with his employer, having been barred from such connection by the Bankruptcy Court. Molloy had been retained in the position of chief executive officer of the bankrupt corporation by the Trustee. Haddle alleges that Respondents, acting pursuant to a preconceived plan, caused his dismissal from the employment of the bankrupt corporation, through Molloy, who acted not in the interest of the bankrupt corporation but in his own personal interest and at the direction of Garrison, Kelly and Healthmaster, the federal indictees.

This Court has recognized in a number of contexts that the Civil Rights Act of 1871, of which what is now 42 U.S.C. § 1985 is an important part, should be "accord[ed]

a sweep as broad as its language . . . " *United States v. Price*, 383 U.S. 787, 801 (1966). One of these contexts is in the scope of the interests sought to be protected. "[T]he rights that Congress sought to protect in the Act of 1871 [including that portion now codified as 42 U.S.C. § 1985] were described by the chairman of the House Select Committee that drafted the legislation as "the enjoyment of life and liberty, with the right to acquire and possess property *of every kind* . . . " *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972) (emphasis supplied). Nevertheless, the court in *Morast* concluded that the interest of a witness who is an at will employee in keeping his job is not such a property interest as is entitled to the protection of this section of the statute.

This Court has also recognized that § 1985(2) itself consists of more than one part, and that these parts have different functions. This case concerns that part of § 1985(2) which proscribes intimidation of or retaliation against any "party or witness" in any court of the United States.

Much about the scope and purpose of this part of 1985(2) was settled in *Kush v. Rutledge*, 460 U.S. 719, (1983). In that case this Court recognized and distinguished the function of § 1985(2) in protecting the processes of the federal courts, including protection of federal witnesses, from other functions of 1985 which might involve the states and the state courts. Emphasizing that protection of federal witnesses is a purely federal interest which does not implicate the rights of the states or the reach of federal power into areas traditionally reserved to the states, this Court held that an allegation of conspiracy to intimidate or retaliate against a federal

witness states a claim under § 1985(2), even if no class-based animus is alleged, as is required to state a claim for interference with state court proceedings.

An action such as this is favored and is not subject to the constraints that govern actions, such as those under § 1985(3) or under the second clause of 1985(2). This distinction made by this Court in *Kush* was based on the plain language of the statute. § 1985(3) and the second clause of § 1985(2) both contain limiting language referring to an intent to deprive persons of the equal protection of the laws, a limitation which is absent from the first clause of § 1985(2), the basis of Haddle's claim.

In *Kush*, plaintiffs had brought an action under § 1985(2) alleging that certain parties had "engaged in a conspiracy to intimidate and threaten various material witnesses in order to prevent them from testifying "freely, fully and truthfully" in his lawsuit in federal court. 460 U.S. at 721. The Court of Appeals below had distinguished those parts of the Civil Rights Act of 1871 relating to "obstruction of justice at the state level," from others relating to "interference with federal litigation," noting that the latter are "institutionally linked to federal interests." 460 U.S. at 722, 725. This Court upheld the Court of Appeals in its determination that, where intimidation of federal witnesses is involved, the statute does not require race or class based animus, as it does in other actions such as those alleging intimidation in state court proceedings or other contexts, emphasizing the more direct federal interest in protecting federal witnesses.

Kush signaled this Court's view that actions under § 1985(2) should be given a much broader construction

than actions under § 1985(3), in order to vindicate and protect the important and unique federal interest in having persons attend and testify in federal court proceedings. The question now presented is whether the protection afforded to United States citizens in such a case depends on whether their employment is "at will" under state law.

As the Court of Appeals for the First Circuit observed in *Irizarry v. Quiros*, 722 F.2d 869 (1983), the *Kush* decision rests "on the plain language of the statute and on the premise that congressional power therefor arose not from the fourteenth amendment and notions of equality, but, rather, from specific federal power to protect the processes of federal courts and the exercise of federal rights." 722 F.2d at 871. Since there can be no question about the extent of Congressional power to provide a remedy for federal witnesses injured as a result of their exercise of the right and duty to give truthful testimony in federal court proceedings, the issue in this case is simply one of statutory construction.

The narrow (but vitally important) issue of statutory construction now before this Court is this: does "injured in his property" encompass the plight of one who has been fired from his at will employment in retaliation for his testimony in federal court? Having given a remedy to anyone "injured in his person or property" by intimidation or retaliation against such person as a federal witness, would Congress have intended to exclude from the protection of the statute those who lose their jobs for testifying in federal court, solely because their employment is "at will"?

The phrase "injured in his person or property" is used only twice in the current United States Code, once in § 1985 and once in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (enacted in 1977), where it serves, as it does in § 1985, to specify who may sue for damages for breach of the statute. In the latter act, the phrase has not been construed in a reported case. The phrase in its nominative form, "injury to person or property", however, is used frequently in federal statutes creating private remedies of various sorts. Respondent has found no interpretation of this language in the federal Code relating specifically to at will employment.

The very similar phrase "injured in his [or, sometimes, "its"] business or property", is also frequently used in Congressional enactments as a means of specifying who may sue in a private action. The most familiar of these uses is in the private remedy provision of the Clayton Antitrust Act, 15 U.S.C. § 15.

In construing the word "property" as it appears in § 15 of the Clayton Act, this Court has given it the most comprehensive meaning possible:

> [T]he word "property" has a naturally broad and inclusive meaning. In its dictionary definition and in common usage "property" comprehends anything of material value owned or possessed. See, e.g., Webster's Third New International Dictionary 1818 (1961). Money, of course, is a form of property."
>
> – *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

This Court in *Reiter* further observed, moreover, that the phrase "injured in his business or property" is nevertheless narrower than it might have been, in that there is no reference to injury to the person. 442 U.S. at 339. In § 1985(2), by contrast, the reference is to the whole gamut of injuries to persons *or* property.

Of course this Court did not consider it necessary in *Reiter* to ask whether the interest being protected (presumably the interest of the plaintiffs in being able to make profits through fair business competition) was a "constitutionally protected" interest. It sufficed that Congress had legislated to protect this interest, just as it has legislated in § 1985(2) to protect the well-being of federal witnesses. The interest of a market competitor in making a profit is certainly a less obvious one than that of an at will employee in his job and livelihood. It would be difficult to conceive of it as more "constitutionally protected". This, however, was not the question. The issue in *Reiter* was simply, as it should be here, what Congress meant by the word "property". Just as the plaintiffs in *Reiter* suffered pecuniary loss from anti-competitive practices, so in this case Haddle has suffered pecuniary loss (through loss of his job) from proscribed retaliation against him.

There can be no serious doubt that the phrases "injury to person or property", "injury to person and property" and "injured in his person or property" all express the same thought: that of any injury other than a breach of contract. As such, it was frequently used in the nineteenth century, as it is today, to designate the widest possible range of tortious injuries.

The fact that an at will employee's employer may have a privilege to discharge him at any time, without cause, does not mean that the employee has no protectible interest in his continued employment. This point was clearly made by the Georgia Court of Appeals in *Troy v. Interfinancial, Inc., supra,* 171 Ga. App. at 766, 320 S.E.2d at 877: "An employee, generally, has a *property right* in his contract of employment (written or verbal even if it is at the will of the employer) which may not be unlawfully interfered with by another" (emphasis supplied). Chief Justice Charles Evans Hughes of this Court was stating an acknowledged proposition when he observed that the fact that an employment contract is "at will" does not mean that an employee has no protectible rights thereunder:

> It is said that the bill does not show an employment for a term, and that under an employment "at will" the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is "at will".
>
> – *Truax v. Raich,* 239 U.S. 33, 38, (1915).

It should be clear that the phrase "injured in his person or property" is intended to specify the broadest

possible range of injuries. "[T]orts are divided into two general classes, namely, "property torts" which involve injury or damage to property, whether realty or personalty, and "personal torts" which involve injuries to the person, whether to the body, reputation or feelings." *Travelers Indemnity Co. v. Chumbley,* 394 S.W.2d 418 (Mo.App. 1965), *rehearing denied.* It was apparently common in the nineteenth century, as for that matter it is now to some extent, to divide all torts into those committed upon the person and those committed upon property. Thus, for instance, in introducing the subject of tort law the seminal Georgia Code of 1860 (the work of one of the earliest codifiers of substantive common law, T.R.R. Cobb, re-enacted verbatim in this respect in 1873) states that "[a] *tort* is a legal wrong committed upon the person or property independent of contract". Georgia Code of 1873, § 2951 (§ 2900 of the Code of 1860).

Indeed, the phrase "injury to person or property" has been construed specifically to include economic damage such as lost wages and benefits that flow from lost employment, including loss of at will employment. *Scott v. Prudential Outfitting Co, Inc.,* 92 Misc. 195, 155 N.Y.S.2d 497 (Supr.Ct.A.D. 1915). *Crapanzano v. Uneeda Credit Clothing Stores, Inc.,* 32 N.Y.S.2d 269 (Mun. Ct.N.Y., 1941) (at will employment). *Tennessee v. Smith,* 197 Tenn. 350, 273 S.W.2d 143 (Tenn. 1954). *Delaware v. Kramer,* 31 Del. 454, 115 A. 8 (1921).

In *Crapanzano, supra,* a court with jurisdiction over all "injuries to person or property", with certain stated exceptions, was called on to determine whether loss of at will employment fell within its purview. It had no trouble

in finding that loss of at will employment is an injury to property.

In *Kramer v. Delaware, supra,* a Delaware court was called to construe a statute criminalizing threats "to do injury to any person or property". The threat charged was that "if the said Walsh did not pay a sum of money to accused, he, the said Walsh, would be deprived of the employment in which he, at the time alleged in the indictment, was then and there engaged." Against the claim that the statute was restricted to physical damage to person or property, the court found that the terms of the section were "most comprehensive" and that "[a] statement made by one person to another unlawfully threatening such other with the loss of present employment, would constitute a threat to do injury to the property of such other person, within the intent and meaning of the words of the statute." 115 A. at 9, 11.

The juxtaposition of the concepts of injury to person and injury to property is significant as showing that Congress intended a very wide reach for the statute. To compare great things to small, this Court's construction of the phrase in the Civil Rights Act of 1871 should be the same as that expressed by the court in *Scott v. Prudential Outfitting Co., supra,* an at will employment case decided in 1915. In *Scott,* the New York court observed that "the language of the [New York statute], "an action to recover damages for a personal injury, * * * or an injury to property," indicates to my mind an intention to include practically all actions for damages except those specifically named." 92 Misc. at 197, 155 N.Y.S.2d at 498. The fact that the plaintiff's employment was at will, although

specifically noted by the New York court, made no difference in its analysis.

The coupling of the concepts of injury to person and injury to property merely emphasizes the broad scope of injuries Congress intended to redress. The damages resulting from loss of employment, including loss of at will employment, although generally characterized by courts as a form of injury to property, can in fact be characterized as injuries to person, as was done in *Stringer v. Board of Trustees of Sparrow Hospital,* 62 Mich.App. 696, 233 N.W.2d 698 (1975) (tortious conspiracy to cause suspension of a physician's hospital privileges). The question seldom arises, and need not arise in this case, as to which covers loss of at will employment, because ordinarily the two concepts are joined, with the intent that together they should describe all tortious injuries whatsoever. The two parts of Congress' language here under consideration, "injured in his person or property", are thus complementary and express Congress' determination to provide a comprehensive remedy.

An examination of the use of the concept of injury to property, in connection with that of injury to person, clearly supports the conclusion of the United States Court of Appeals for the First Circuit when, interpreting this provision, it observed that "[p]roperty here must include any economic damage that would be recognized in an ordinary tort suit." *Irizarry v. Quiros,* 722 F.2d 869, 871 (CA 1 1983). The Court of Appeals for the Ninth Circuit, refusing to follow the Fifth Circuit *Morast* decision, has endorsed this conclusion and specifically found that loss of *at will* employment is compensable damage under § 1985(2):

§ 1985(2) contains two clauses that give rise to separate causes of action. The first clause concerns access to *federal* courts, giving rise to a cause of action where two or more persons in any State or Territory conspire [A] to deter, by force, intimidation, or threat, any party or witness *in any court of the United States* from testifying to any matter pending therein, freely, fully and truthfully, or [B] *to injure such party or witness in his person or property on account of his having so attended or testified* . . .

The district court dismissed Portman's complaint on the basis of the second and fourth elements, concluding "a cause of action for denial of access to the courts was not meant to provide a remedy for repercussions such as a salary denial or termination." We disagree with this conclusion. Although this court has not addressed the question, other circuits have concluded that plaintiffs who 'have proved that they were denied [employment opportunities as a result of a conspiracy] because they previously had instituted legal actions to vindicate their federal rights' have made out claims under § 1985, even where they had no constitutionally protected property interest in the job. *See Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983); *see also Wright v. No Skiter Inc.*, 774 F.2d 422 (10th Cir. 1985) (plaintiff alleging that the defendants conspired to defeat his low bid for a contract in retaliation for his bringing a federal suit states a claim under § 1985(2)). As the court in *Irizarry* explained, " '[p]roperty here must include any economic damage that would be recognized in an ordinary tort suit.' " *Id.* We see no reason to depart from the approach of those cases, and

conclude that the district court erred in dismissing the claim on this basis.

– *Portman v. County of Santa Clara*,
995 F.2d 898, 909-910 (CA 9 1993).

In enacting this particular portion of § 1985(2), based on its undoubted power to protect litigants and witnesses in federal court proceedings, the 42nd Congress used the most inclusive language with which it was familiar to specify who might have its protection and remedy.

The part of § 1985(2) with which this case is concerned, relating to protection of federal court processes, was enacted with little discussion. With reference to this portion of the statute, the reserved rights of the states received and needed no consideration at all. Whereas other portions of the Ku Klux Klan Act were extensively argued, and eventually modified, because of concerns about states' rights (as this Court has also repeatedly observed), the portion protecting federal litigants, witnesses, jurors and others from intimidation or retaliation because of their participation in federal judicial proceedings was never controversial. The reason is simple. All parties recognized that it is inherent in the nature of any judicial system that it be able to protect those who participate in it. In so doing, Congress was acting in the clearest fullness of its sovereign powers. It used the language which had developed in Anglo-American law to describe the full range of injuries resulting from tortious conduct. Its words must be construed as broadly as their common law background, the usage of the period and subsequent periods, the manifest intent of Congress, and the mischief sought to be remedied require.

Every witness should be protected from retaliatory loss of his job by 42 U.S.C. § 1985(2). Haddle, like every other worker in America, is protected by federal law against being intimidated or retaliated against, in his employment or otherwise, for exercising a federal right. To hold otherwise would be to upset one of the clearest and best established principles of civil rights law. Where an employee is discharged for a federally proscribed reason, such as to intimidate and retaliate against him for testifying in a federal court proceeding, he does have a legally cognizable injury. No one would dream of applying such a principle to strip "at will" employees of protection against racial or other invidious discrimination. Nor is there any reason to give less protection to federal witnesses.

An at will employee, who holds his job at the mercy of his employer, cooperates as a federal witness before a federal grand jury in a federal investigation of criminal conduct by his former employer and officers of his former employer. In response, these persons successfully conspire to have him discharged from his at will employment in retaliation for his cooperation with the government, his appearance to testify before the grand jury and his expressed intention to testify at the criminal trial. They are able to do this because one of them is in effective control of the witness's present employer. Their conspiracy is evidenced by direct testimony. Yet the Eleventh Circuit has ruled that this witness has no remedy under federal law for violation of his federal right by these persons, because his employment was terminable at will under state law. The Ninth Circuit has decided to the contrary. The First Circuit clearly would decide to the

contrary. This Court should resolve this conflict in favor of protection of federal witnesses and the integrity of the administration of justice in the federal courts, in line with the purpose and wording of 42 U.S.C. § 1985(2).

B. In the first clause of § 1985(2), Congress intended to protect all federal witnesses who lose their jobs as a result of attending and giving truthful testimony in federal court, not just those already protected by state contract law

The legislative history of the Civil Rights Act of 1871 is replete with evidence of Congress' concern that freedmen and others attempting to exercise their federal rights were being fired from their jobs and deprived of their livelihoods as a consequence. See, *e.g.*, Congressional Globe, 42nd Congress, First Session Appendix pages 293 (Democratic club resolves that "no man should employ colored men who voted the Republican ticket"; "if they voted the Radical ticket, they should not live on their land or be employed by them in any way . . . as they were dependent upon us for everything – land, employment and sustenance . . . "), 294 (witness discharged from his employment for voting the Republican ticket), 295 (persons would be "turned off and left to starve" and "turned away from the houses they occupied as employees".) Any general history of the Reconstruction period will mention the role of economic coercion, including discharge from employment, in attempts to subvert federal authority in the occupied states. For instance, John Hope Franklin notes that "[b]y discharging or threatening to discharge Negro employees who persisted in participating in politics, [white employers] could reduce the Negro electorate

to a minimum." Franklin, Reconstruction After the Civil War (1961), p. 173.

Admittedly, most of this concern seems to have been focused on employment reprisals carried out against persons who dared to exercise their right to vote, or who failed to vote "correctly". Considering, however, that the language giving a private claim to any person "injured in his person or property" is common to all the outrages which § 1985 proscribes, this makes no difference. The point is that Congress was well aware, in enacting § 1985, that one of the most potent and often employed weapons of retaliation against those exercising federally protected rights, including the right and the duty to testify in federal court proceedings, was deprivation of employment. It cannot be seriously doubted that most of those so discriminated against were what are now called "at will" employees, too weak in bargaining power and social and economic position to have obtained contractual guarantees of employment. It is simply impossible to imagine that the 42nd Congress, in protecting those who were injured in their person or property because of their having been witnesses in federal court proceedings, intended to exclude from this remedial measure all those who had lost their jobs but had no contractual security of employment.

C. Even if resort to state law is required to determine whether Haddle has alleged injury to person or property within the meaning of the statute, Haddle has stated a claim, because (1) under Georgia law, economic damages resulting from loss of at will employment are an injury to a "property interest", and (2) the question of who may be *liable* for such an injury remains, necessarily and by the words of the statute itself, a question of federal law

Haddle anticipates that Respondents will argue that, since the Georgia courts have (thus far) refused to give Haddle a remedy against these Respondents on state law tort theories, Haddle can have no remedy in federal court under § 1985(2).

Haddle believes that the state court order dismissing his state law claims for tortious interference and under Georgia's "RICO" statute is clearly contrary to established Georgia precedent. His petition for certiorari is now pending before the Georgia Supreme Court. Be that as it may, the dismissal of Haddle's suit by the Georgia state courts, even if allowed to stand by the Georgia Supreme Court, should not adversely affect the disposition of this action. In fact, this would only reinforce the need for a federal remedy for this variety of intimidation of a federal witness.

Haddle's claims herein are against persons other than his employer. This in itself would serve to distinguish his case from any case denying relief to an intimidated witness against his at will employer. Even if Haddle's case were against his employer, however, the fact that it would be barred by Georgia state law if cast under a state law theory should not foreclose a federal remedy. This would

not change the fact that Haddle had a vital property interest in his continued employment, which can be and is protected by federal law in this case.

The state trial court's order is based on its finding that the Respondents, even those who were concededly not employed by Haddle's employer at the time of his discharge, are entitled to share in the protection from suit granted by Georgia law to an "at will" employer. It is not based on any theory that Haddle had no property right in his continued employment. In fact, it recognizes that he did. This recognition is indeed compelled by existing Georgia law, including *Troy v. Interfinancial, Inc.*, 171 Ga.App. 763, 766, 320 S.E.2d 872, 877 (1984), *cert. denied*, as quoted above in Part A: "An employee, generally, has a *property right* in his contract of employment (written or verbal even if it is at the will of the employer) which may not be unlawfully interfered with by another." The state court's order simply finds that none of the Respondents, under the circumstances of the case, can be held legally responsible *under a state law theory*.

Whatever else about the history of the Civil Rights Act of 1871 may be debated, it is incontrovertible that it was passed because of Congressional dissatisfaction with the scope and efficacy of state law remedies. It would be an astounding reversal for this Court to hold that Haddle has no federal remedy for the retaliation visited upon him for his exercise of his federal right and duty to testify in a federal proceeding, simply because the courts of the State of Georgia will afford him no remedy. In enacting the Ku Klux Klan Act, Congress was concerned with, among other things, the failure of the states to give a remedy for injuries inflicted on persons exercising certain

important federal rights. In the case of the right (and duty) to testify in federal court, at least, some states still refuse to grant relief in an important class of cases.

Suppose that, even in § 1985(2), state law must determine whether Haddle has been "injured in his person or property". There can be no doubt that he has been, because he has suffered economic loss by being deprived of his at will employment, which is *expressly* characterized by Georgia law as a "valuable property right". *Troy v. Interfinancial, Inc., supra*, 171 Ga.App. at 766, 320 S.E.2d at 877. The function of state law ends when this determination is made. Whether any particular person can be held liable under 42 U.S.C. § 1985 for a conspiracy to injure this right is surely a question of federal law.

Moreover, it is one that the express wording of the statute answers: any person injured *"against any one or more of the conspirators"*.

Federal law (§ 1985 itself) specifically says that the victim of a conspiracy to injure him in his person or property shall have an action "against *any one or more* of the conspirators" (emphasis supplied). Even if under st law various participants in a conspiracy would be im une from suit, either because they were the plaintiff's at will employer or because they were so identified with the employer as to partake of its immunity, there is no reason that this immunity should be imported into federal law, when the federal statute, § 1985, plainly provides that *all* conspirators shall be liable. None of Respondents herein, other than Molloy, were even officers or employees of Haddle's employer.

In some states, an employer is free as a matter of state law to fire his at will employees simply for testifying against him (or anybody else) in court, state or federal. Yet a federal statute, enacted to preserve the integrity of the federal courts, declares that "any person" "injured in his person or property" by way of retaliation for his testimony in federal court may obtain redress in federal court. This statute should not be judicially limited so as to exclude from its operation the most vulnerable class of persons who may suffer from retaliation, that is, those who hold their very livelihoods on sufferance. The only shadow of justification for such a procedure emanates from the idea that at will employment is not "property". Yet, as shown above, this idea is simply wrong. Georgia law expressly describes a person's interest in his at will employment as a "property interest". Furthermore, cases which have considered whether at will employment is "property" have uniformly concluded that it is.

Even if the range of interests protected by Congress, in its attempt to insure the integrity of federal courts, were to be limited by state law, it still does not follow that those who may be held liable for invading that integrity must also be limited by state law. In fact, the plain words of § 1985(2) show the contrary, when they provide that, if a conspiracy is shown to intimidate or retaliate against a federal witness, the injured party may have a remedy against "any one or more of the conspirators".

D. Public policy strongly supports protecting witnesses who lose their at will employment because they have attended federal court proceedings and testified truthfully therein.

Testifying in a federal trial is a right protected under the United States Constitution. Absent this right, "the foundations of federal justice would be undermined." *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir. Unit B, 1982), *quoting United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974), *cert. denied*, 419 U.S. 826 (1974).

Federal witnesses, who have both a right and a duty to give truthful testimony in federal court, should not be required to do so only upon pain of the threat of losing their livelihoods, even if they belong to that large class of persons who have been unable to secure contractual rights to employment. They should not be relegated for redress to the contradictory court decisions of the fifty states. Neither principles of statutory construction, nor the purpose and history of the Civil Rights Act of 1871, nor sound policy furnishes any basis for such an unjust result.

The Eleventh Circuit precedent used to dismiss Haddle's suit stripped the protection of 42 U.S.C. § 1985(2) from those most vulnerable and most in need of it: employees who hold their livelihood "at the will" of their employers, so that those against whom they testify have only to persuade their employers to discharge them from their precarious employment, in order to inflict tremendous injury. The effect of this holding is that a witness in a federal criminal proceeding, who is protected against being interfered with or retaliated against by a

specific provision of federal law, 42 U.S.C. § 1985(2); has no federal remedy if he is fired from his job for being a witness, if his employment is terminable "at-will" under state law. 42 U.S.C. § 1985(2), a portion of the Civil Rights Act of 1871 which was passed expressly to give a remedy to those injured by intimidation and retaliation for exercising their federal right and duty to give evidence in federal court proceedings, is thus rendered of no effect to remedy this devastating and most likely of harms. This seriously affects the integrity of the federal judicial system and the administration of federal law.

The arbitrary and irrational line drawn by the Court of Appeals for the Eleventh Circuit would balkanize federal protection of witnesses in those cases where it is most vital. Many states have recognized that an at will employee's property interest in his job justifies an action against his employer, despite his at will status, when the employee is fired for participating in various ways in court or administrative proceedings. See, *e.g., Petermann v. International Brotherhood of Teamsters, etc.*, 174 Cal.App. 2d 184, 344 P.2d 25 (2d Dist. 1959), *Sides v. Duke Hospital*, 74 N.C.App. 331, 328 S.E.2d 818 (1985) (refusal of employee to commit perjury), and *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P.2d 625 (1982) (employee discharged to prevent testimony before grand jury) . Similarly, applying general maritime law, the United States Court of Appeals for the Fifth Circuit has recognized the injustice of the strict at will theory, finding that a seaman discharged for exercising his federal right to file a lawsuit under the Jones Act has a claim for damages under general maritime law. *Smith v. Atlas Boat Service, Inc.*, 653

F.2d 1057 (Fifth Cir. 1981). Nevertheless, other states continue firmly to refuse to recognize any exceptions to the immunity of the employer of an at will employee. See, *e,g., Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983), and *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978).

Are the states to set the parameters of federal protection for federal witnesses in federal proceedings, or limit the relief availabe to those injured by the serious offense against the United States of intimidation of or retaliation against witnesses in its courts? Will the at will employee in California, North Carolina or Hawaii be protected, while his counterpart in New York or Georgia will not be? This situation would be intolerable. Fortunately, there is no justification for it in the statute being construed.

CONCLUSION

Haddle respectfully requests that the plain language of 42 U.S.C. § 1985 be given effect, that this Court hold that loss of at will employment is compensable damage under 42 U.S.C. § 1985(2), and that the decision of the United States Court of Appeals for the Eleventh Circuit in this case be reversed and remanded to the Court of Appeals with instructions to return the consolidated appeals (Nos. 96-8856 and 96-9072 in the Court of Appeals*) to the United States District Court for the

*By printer's error, one of the two caption pages for the Opinion of the Court of Appeals below was left out of Appendix A to Haddle's Petition for Certiorari herein. It is included in the Joint Appendix herein.

Southern District of Georgia for further proceedings not inconsistent with the Opinion of this Court.

Respectfully submitted,

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